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IN THE

Supreme Court of the United States

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..... TERM, 19.....

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NO. 831

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GENE LOGAN ALGER,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

_____

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Gene Logan Alger, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit affirming a judgment of the United States District Court for the Southern District of Indiana in which your Petitioner was found guilty on both counts of a two-count indictment which charged him with conspiring to utter and publish counterfeit money and with aiding and abetting the commission of that offense.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the original judgment in this cause and the opinion denying a rehearing of same have not yet been reported but they are set forth in the Appendix herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit denying your Petitioner a rehearing of his cause was entered on January 20, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTION PRESENTED

Whether in determining the sufficiency of evidence to sustain a conviction, it is necessary as a matter of due process to exclude, from consideration all evidence which the jury necessarily found to be perjured by reason of its acquitting a co-defendant.

LAWS INVOLVED

Amendment V to the United States Constitution, due process clause is involved.

STATEMENT

Petitioner was charged with conspiring to counterfeit money and with aiding and abetting the counterfeiting of money. A total of four individuals were named in the indictment either as conspirators, aiders and abettors or as principals. One of the four named individuals was granted immunity and became a witness for the Government. Petitioner was brought to trial along with one

co-defendant. Petitioner was found guilty as charged and given executed sentences of five years on the conspiracy charge and of seven and one-half years on the aider and abettor charge with the sentences to run concurrently. Petitioner's co-defendant was acquitted on all counts. No record appears in this cause as to the disposition of the fourth named individual in the indictment.

By and through the testimony of an uncorroborated accomplice, the Government presented a prima facie case of conspiracy against Petitioner and his co-defendant. With this testimony excluded from consideration on the conspiracy count, there would be no question that a prima facie case was not presented on that count. With respect to the charge of conspiracy, the testimony of the accomplice was identical and unmistakable as to Petitioner and his acquitted co-defendant.

By and through the testimony of the same uncorroborated accomplice, the Government presented a prima facie case of aiding and abetting against Petitioner and his acquitted co-defendant. Many portions of this testimony were identical and unmistakable as to Petitioner and his co-defendant and there is a serious question as to whether a prima facie case was presented with this testimony excluded from consideration. This question was not resolved in the decision being appealed from.

During the trial of this cause there was evidence that Petitioner had murdered a policeman in 192[illegible], robbed a bank in 1929 and burglarized a post-office and broke jail in 1941. There also was evidence that Petitioner had spent over twenty years in prison. The jury was duly admonished that this evidence only went to Petitioner's credibility. There also was evidence that the record of

Petitioner's acquitted co-defendant consisted of only one juvenile offense.

Upon the conviction of Petitioner, an appeal was taken to the United States Court of Appeals for the Seventh Circuit where the issues presented herein were duly presented to that Tribunal. The Seventh Circuit affirmed, citing, as authority, a maxim uttered in one of its previous decisions to the effect that "The fact that a jury finds one party not guilty does not militate against a verdict of guilty as to a co-defendant".

A Petition for Rehearing was entered on Petitioner's behalf urging that Petitioner's appellate theory was not to the effect that a verdict of acquittal, as to one co-defendant has any direct bearing on the legality of a verdict of guilty as to another co-defendant, but to the effect that any determination as to the sufficiency of the evidence must not be based upon evidence which the jury found to be perjured or false. The Seventh Circuit denied this Petition For Rehearing and thus framed the issues for this appeal.

REASONS FOR GRANTING WRIT

The decision being appealed from is clearly based upon a misconstruction of existing law and constitutes a failure to recognize Petitioner's constitutional right to be deprived of his liberty only through due process. When the evidence which was designated as perjured and false by the jury's verdict acquitting Petitioner's co-defendant is excluded from consideration, it is readily manifest on the face of the record in this cause that the Government did not present a prima facie case against Petitioner.

The question that would be presented if this Petition for Appeal is granted has never been confronted by any

decision of this Court or the decisions of any other courts with the exception of the decision from which this appeal would be taken. But, because there are numerous holdings on issues similar to the issue being raised herein, it is necessary to distinguish a representative assortment of these holdings in order to establish that the question presented is novel and of such significance that this Court should note probable jurisdiction.

Petitioner is cognizant of the numerous rulings of the various Appellate Courts to the effect that the inconsistency of a verdict will not militate against its validity. Petitioner is also cognizant of the general proposition that an Appellate Court will not weigh the evidence presented at the trial of a cause. But Petitioner will demonstrate that there are exceptions to both of the above propositions which apply to the cause herein.

The universality of the above cited maxims has often been challenged. Numerous Federal decisions have held that where a portion of a jury's verdict necessarily determines that the evidence failed to establish a fact which is an essential ingredient of the offense charged, "then in determining whether the evidence was sufficient to sustain the finding of guilty, the Court must exclude from consideration the fact so found in favor of the accused. And so in every such case the question of law for the Court always is whether, outside of the fact eliminated by the verdict of not guilty, the evidence was sufficient to warrant the conviction". This quote is from an opinion of Justice Butler at 284 U.S. 404. Cases supporting this statement of law are: *John Hohenadel Brewing Co. v. United States*, (CA 3) 295 F. 489; *Perce v. United States*, (CA 8), 22 F. 2d 547; *Baldini v. United States*, (CA 9) 286 F. 133.

It is a long standing maxim that "In criminal cases no form of verdict will be good which creates a repugnancy or absurdity in the conviction", 2 Bishop, New Crim. Proc. 2d Ed., Sec. 1015a (5). Both substantive and procedural due process militate against such absurdities and require their erasure from the roll of just convictions.

Also there are numerous holdings by eight of the Federal Circuit Courts and dicta uttered by this Court to the effect that a blatantly inconsistent verdict creates a repugnancy on the record. A representative assortment of these holdings are to be found in the following decisions: *Donegan v. United States*, (1922 CA 2), 287 F. 641; *Grove v. United States*, (1925 CA 4), 3 F. 2d 965; *Rosenthal v. United States*, (1930 CA 8), 45 F. 2d 1000; *Worthington v. United States*, (1933 CA 7), 64 F. 2d 936; *Thompson v. United States*, (1955 CA 5), 227 F. 2d 671; *United States v. Gordo*, (1957 CA 3), 242 F. 2d 122; *United States v. Weinberg*, (1955 CA 3), 226 F. 2d 161; *Packard v. United States*, (1950 CA 6), 181 F. 3d 326; *Apodaca v. United States*, (1951 CA 10), 188 F. 2d 932; *Hartzell v. United States*, (1944), 322 U.S. 680, 88 L. Ed. 1334, 64 S. Ct. 1233 (Opinion by Murphy); *United States v. Williams*, (1951), 341 U.S. 70, 95 L. Ed. 758, 71 S. Ct. 581, (Opinion by Black).

Petitioner recognizes that the above cited holdings go no further than to rule that a jury verdict will be reversed if the verdict constitutes a patent absurdity when viewed in conjunction with the Government's theory of prosecution. But the Fifth Circuit has gone further in twice ruling that the verdict of a jury will be reversed where it constitutes a latent absurdity that becomes manifest upon a review of the evidence.

In *Adamston v. United States* (1949 CA 5), 177 F. 2d 370, the Fifth Circuit reviewed the evidence before ruling upon the Appellant's contention that the jury necessarily found him to have conspired with himself because the evidence indicated two conspiracies, not one and the only other convictions were returned against individuals involved in a conspiracy separate from that which was allegedly perpetrated by the Appellant and others. In *Herman v. United States*, (1961 CA 5), 289 F. 2d 362, the Fifth Circuit again reviewed the evidence and arrived at a ruling favorable to the appellant in his contention that the jury found him to have conspired with himself because it acquitted the only individual who was linked with him in any of the overt acts alleged in the indictment.

State courts, as well as Federal courts, have reversed jury verdicts for the reason that they were made absurd by the acquittal of certain co-defendants. In *People v. Angelopoulos*, 86 P. 2d 873, a conviction was reversed where appellant was found guilty of arson and the State's theory of prosecution was to the effect that appellant was not at the scene of the crime but he had paid his acquitted co-defendants to commit the alleged act. There are many State Court decisions of this sort—far too many to cite here; but a large number of these decisions are listed and discussed at 91 ALR 2d 697, 700.

In the decision which the Seventh Circuit rendered in this cause, the Court, in effect, held that an acquittal of a co-defendant will not militate against a verdict of guilty entered against another defendant. In view of the manner in which the issues were framed and resolved, it is apparent that the Court intended its holding to apply regardless of whether the verdict constituted a latent or even a patent absurdity. In so ruling, the Seventh Circuit held

contrary to its own holdings in the heretofore cited *Worthington* case, as well as in *United States v. Bates* (1944 CA 7), 141 F. 2d 436, chosing, rather, to extend a dictum uttered in *United States v. Hare*, 153 F. 2d 816, 819, to the effect that "the acquittal of a co-defendant does not militate against a verdict of guilty" and to elevate that dictum to the dignity of a far reaching rule of law.

In presenting his appeal to the Seventh Circuit, Petitioner argued that those portions of the evidence which the jury necessarily found to be false and perjured in acquitting Petitioner's co-defendant should be excluded from consideration in determining whether a prima facie case was presented against Petitioner. The Seventh Circuit responded with an indiscriminate recital of all of the evidence and a categorical disclaimer of any requirements of consistency in jury verdicts.

If this Court grants this Petition for Appeal it will readily become manifest on the record that an imposition of the judgment and penalty that has been levied in this cause would constitute a gross violation of Petitioner's rights under the heretofore cited paragraphs of the United States Constitution.

Petitioner was prosecuted on the charge of "conspiracy" which Judge Learned Hand has described as "that darling of the modern prosecutor's nursery". *Harrison v. United States*, (1925 CA 2), 7 F. 2d 259. In presenting its case against Petitioner, the Government utilized another "darling in the modern prosecutor's nursery", the uncorroborated accomplice.

The testimony of this accomplice was all but identical as to Petitioner and his acquitted co-defendant and the testimony which pertained to the conspiracy was totally

identical with respect to Petitioner and his acquitted co-defendant, both being unmistakably implicated in virtually the same breath. In that the conclusion is inescapable that the jury found this testimony to be perjured in acquitting Petitioner's co-defendant, your Petitioner is contending that it was in derogation of his rights for the Court of Appeals for the Seventh Circuit to proceed to its determination of whether there was a prima facie case presented against Petitioner without first excluding from consideration that testimony which the jury found to have been perjured and false.

There is ample authority which has heretofore been cited in support of the proposition that the question presented herein is substantial and that its resolution would not require this Court to go beyond the scope of the Appellate jurisdiction which it has previously undertaken. That the question being presented is novel can best be demonstrated by distinguishing it from a representative assortment of decisions which held apparently inconsistent verdicts to be valid.

All of the cases discussed below can be distinguished from this case in that there was good reason to leave the apparently inconsistent verdicts undisturbed. These reasons arose either from the fact that the mental state of the respective co-defendants was an essential element of the crime charged or from the fact that the eye witnesses could have been mistaken as to the identity of one co-defendant and correct as to the identity of the other.

In *Hays, v. State*, 211 S.W. 2d 210, an apparently inconsistent verdict as to two co-defendants was upheld but the crime charged therein was Murder and the question of mens rae or wilful intent could have been resolved differently with respect to each co-defendant after viewing

their demeanor in Court and on the witness stand." In *State v. Thompkins*, 68 S.E. 2d 465, a similar verdict and a similar appellate ruling obtained but the charge therein was Assault with *Intent* to Kill.

In other such cases, a study of the record reveals that it was possible for the jury to distinguish co-defendants on the basis of scienter of knowledge of the *corpus delecti*. In *Bridgman v. United States*, 183 F. 2d 7[illegible], the charge was Conspiracy and the evidence permitted a distinction among the co-defendants as to whether they were knowing or unknowing participants in the alleged conspiracy. In *Bailer v. State*, 193 So. 873, the charge was Miscegination and the evidence permitted a distinction to be made between the co-defendants on the question of scienter.

Even where mens rae or scienter do not present themselves as significant questions it is permissible for a jury to return an apparently inconsistent verdict where it appears that the jury could have found testimony identifying the co-defendants correct as to one co-defendant and mistaken as to the other. *People v. Mayes*, 177 P. 2d 590 was such a case. Both co-defendants were identified by their alleged victim but one of them had an alibi.

The facts in this case are similar to those in *People v. Mayes*, supra, in that Petitioner's acquitted co-defendant presented an alibi in refutation of the uncorroborated accomplice's testimony that he was present at a meeting from which the conspiracy allegedly evolved. But the facts in this case differ from those in *People v. Mayes*, in that the jury couldn't possibly have found that the witness was merely mistaken as to one co-defendant and correct as to the other. Here the testimony was such that Petitioner's co-defendant couldn't possibly have been ac-

quitted without a finding by the jury that the testimony in question was perjured.

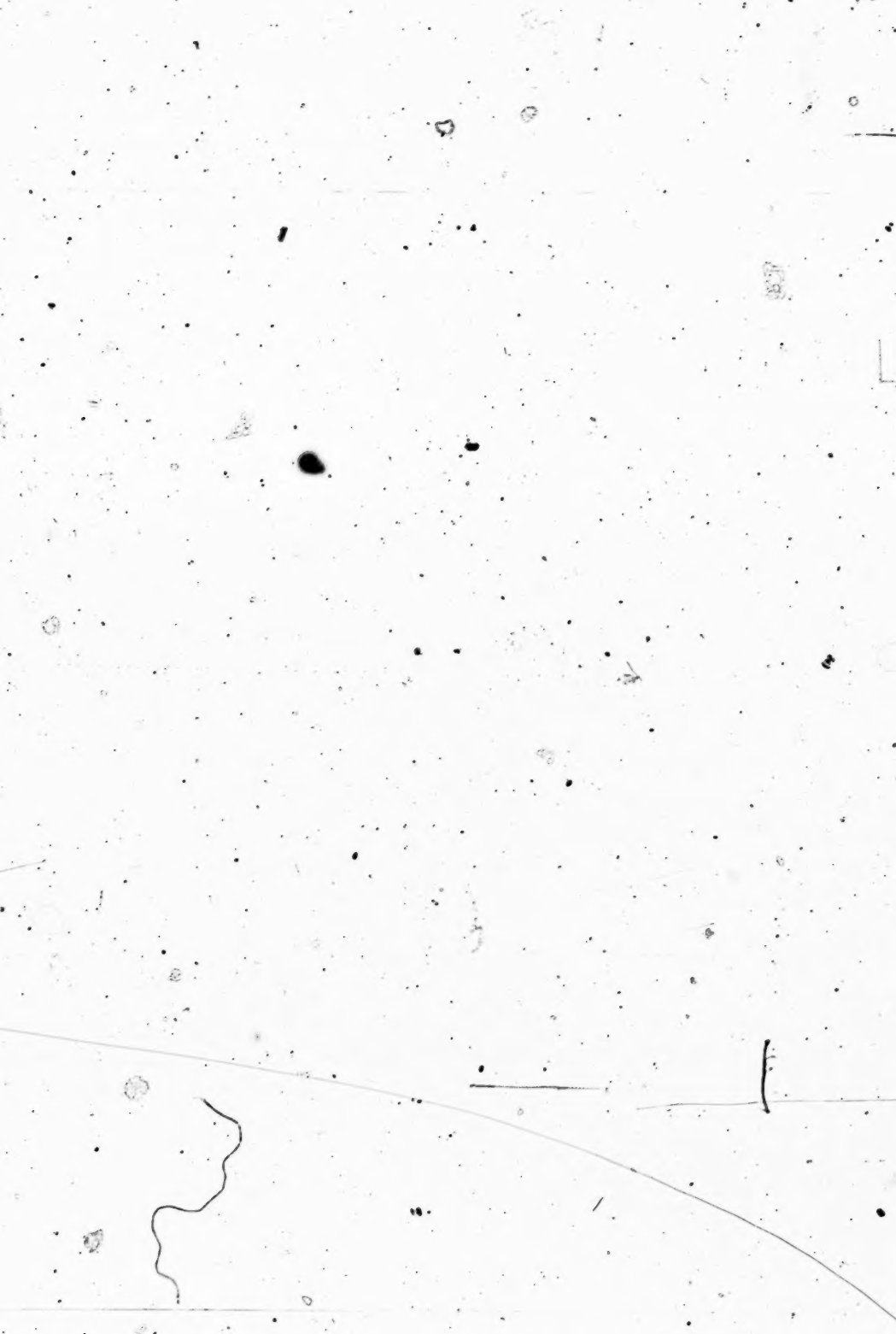
In the oral argument that was presented before the Court of Appeals for the Seventh Circuit, it was suggested by one of the Judges of that Court that the jury might possibly have found the uncorroborated accomplice to be lying with respect to the acquitted co-defendant because of animosity toward him but to be telling the truth with respect to Petitioner out of a desire to see justice done. This speculative theory would be the only possible theory which would support the consistency of the jury's verdict.

That such speculation as to the mental processes of jurors is beyond the scope of review of appellate tribunals has been specifically noted by Justice Butler in *Dunn v. United States*, (1932), 284 U.S. 390, 407, 52 S. Ct. 189, 76 L. Ed. 356. The *Dunn* case involved a question similar to that presented herein and it was strongly urged by Justice Butler that "The law does not permit investigations into the deliberations of juries for ascertainment as a matter of fact upon what considerations verdicts are reached: the soundness of that rule has never been questioned."

It is in view of this ruling that your Petitioner is presenting the proposition submitted herein: That where there is a patent inconsistency in the verdict of a jury or where there is a latent inconsistency which becomes manifest upon a review of the evidence, due process of law requires that the said verdict be pronounced void.

Respectfully submitted,

WILLIAM C. ERBECKER
Attorney for Petitioner



APPENDIX

IN THE

United States Court of Appeals for the Seventh Circuit

No. 14,000 SEPTEMBER TERM AND SESSION, 1963.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. GENE LOGAN ALGER, *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

NOVEMBER 15, 1963

Before DUFFY, SCHNACKENBERG and KNOCH, Circuit Judges.

DUFFY, Circuit Judge. Defendant was charged in two counts of a four-count indictment. Count 1 charged defendant Alger, together with co-defendants Billings and McClung, and with Chester Mohler, referred to as a co-conspirator but not as a defendant, conspired to make

counterfeit obligations of the United States of America and to pass, utter and publish counterfeit money.

Count 2 charged defendants Billings and McClung did counterfeit 696 ten dollar bills on April 3, 1961, and that defendant Alger did aid and abet the commission of that offense. The jury found defendant Alger guilty of charges contained in Counts 1 and 2.

Co-conspirator Mohler testified he first met Alger in the latter part of September 1960. That is October of 1960, Mohler, at the residence of defendant Alger, participated in a conversation between and among McClung, Billings and Alger. There was conversation as to whether Alger could make ten dollar bills. There was further conversation about acquiring an offset press to print money. Alger, who was in the printing business, stated he thought such a press could be acquired in Detroit.

There was testimony that some time about the 15th of December, 1960, Alger, McClung, Billings and Mohler were at the garage of Alger's home and that Alger reported he had made arrangements to obtain a printing press, and he stated that he could make counterfeit money.

There was further testimony that in January 1961, Alger, Billings and McClung were seen in the back yard of McClung's house taking a picture of a ten dollar bill. McClung was the son-in-law of Alger. Further, Mohler and McClung attempted to make a negative from the picture taken of the bill but the negative produced insufficient detail. Then Billings and Mohler cut and spliced some negatives and tried to make a satisfactory plate. Mohler testified defendant Alger showed him how to splice the negative. The attempt to print from these negatives was made at Alger's residence.

A considerable amount of the foregoing testimony was supplied by the co-conspirator, Mohler. As might be expected, Alger's attorney bitterly attacked the credibility of Mohler. However, it was the province of the jury to pass upon the question of credibility. *United States v. Coduto*, 7 Cir., 284 F. 2d 464, 466.

However, Mohler's testimony is in many respects corroborated by the witness Everett German. Alger told German that the camera did not make a sufficiently sharp image. Alger brought the camera to German's house. Alger, McClung and Mohler were there present.

German testified that on a Sunday afternoon in January "... they were all there in the dark room or the shop I had built on my garage, discussing it." He testified "... an attempt was made to find out why the camera wouldn't cut a sharp picture."

German expressed his opinion that the reason a sharp picture was not obtained was due to the camera lens used. In February 1961, a camera lens was sold by Burke & James of Chicago. The sales slip was made out to Gene Alger. A copy of this sales slip was found on the person of defendant Alger at the time of his arrest.

Alger's next door neighbor, Jane May Crone, testified she usually got home from work about fifteen minutes to four in the afternoon, and that in the latter part of December 1960 and during January and February 1961, she observed a number of gatherings on the breezeway of Alger's home where the printing press was located. Among those identified were Billings, McClung and Mohler. It was established that Alger usually did not reach his home before 4:30 or 5 o'clock p.m.

In support of the conviction of Alger for aiding and abetting, the evidence disclosed the finding of $22,680 in counterfeit money and a plate bearing the impression of the back of a ten dollar Federal Reserve Note in Alger's garage. Furthermore, these counterfeit notes were printed on Cranes Crest paper which was the same type of paper that was used in printing the notes found in Alger's garage.

Alger admitted that he told McClung that money was printed on 100% rag paper. He also admitted his signature to several documents that were needed in the procurement of the printing press.

In defendant's reply brief and upon oral argument before this Court, counsel for Alger relied principally upon the contention that inasmuch as the jury acquitted co-defendant, Billings, the evidence was manifestly insufficient to sustain the guilty verdict as to Alger. Defendant argues that the jury's verdict was inconsistent and that in finding Billings "not guilty" the jury was, in effect, saying that Mohler's testimony was perjured.

Counsel for Alger admits the existence of many cases which have held that the acquittal of one co-defendant creates no ground for reversing the cause as to the others, even when it appears that the evidence against both co-defendants was so similar as to render the jury's verdict inconsistent.

However, counsel seeks to distinguish such cases as *Hayes v. State*, 152 Tex. Cr. R. 65, 211 S.W. 2d 216; *State v. Thompkins*, 220 S.C. 523, 68 S.E. 2d 465; *Bailey v. State*, 239 Ala. 2, 193 So. 873; and *People v. Mayes*, 78 Cal. App. 2d 282, 177 P. 2d 590. Counsel argues that in *Hayes* where the charge was murder, the question of

intent could have justified the jury resolving differently with respect to each co-defendant; that the same situation existed in *Thompkins* where the charge was assault with intent to kill; that in *Bailey* there could have been a distinction on the question of scienter and in *Mayes*, on the question of identity.

In *United States v. Hare*, 153 F. 2d 816, this Court said at page 819: "The fact that a jury finds one party not guilty does not militate against a verdict of guilty as to a co-defendant . . . We look to the evidence to determine the guilt of an accused person, not to the verdict as to the guilt of another defendant."

Taking the evidence in the light most favorable to the Government, there is sufficient evidence in the record before us to sustain the judgment of guilty on Counts 1 and 2 of the indictment.

In the main brief, defendant Alger claims error in the giving of certain instructions and refusal to give tendered instructions. Counsel for defendant did not make objection at the trial because the Court failed to give instructions which were tendered by defendant, nor was objection made to Instruction No. 28. Furthermore, the ground upon which Instruction No. 10 was objected to at the trial is not the ground for error urged on appeal.

The only instructions which we can properly consider are No. 21 and No. 26. We hold the objection to Instruction No. 26 is not well taken. As to Instruction No. 21, although the first three lines are somewhat confusing, we think when the instruction is considered as a whole, that there was no error.

In defendant's original brief, error was urged in admitting certain exhibits and testimony into evidence. No.

mention of this was made in the reply brief or in oral argument. However, we have considered these objections and hold that no error was committed.

Other objections by defendant Alger have been considered by us, but we think they are without merit.

The judgment of conviction of defendant Alger is

AFFIRMED.

ORDER AFFIRMING JUDGMENT

United States Court of Appeals for the Seventh Circuit

Chicago, Illinois 60610

MONDAY, JANUARY 20, 1964

Before

Hon. F. RYAN DUFFY, *Circuit Judge*

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

Hon. WIN G. KNOCH, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 14000 vs. GENE LOGAN ALGER, *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.